STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 10, 2006
v	No. 267761 Calhoun Circuit Court
GENAIL QUINCY POSTLEY, JR., Defendant-Appellee.	LC No. 2005-003191-FC

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this interlocutory appeal, plaintiff appeals on leave granted from the trial court's order partially granting defendant's motion to suppress evidence. We affirm in part and reverse in part.

Defendant is charged with several crimes arising from the events of May 9, 2005, during which it is alleged that defendant fatally shot a Battle Creek Police detective and wounded another, and committed two carjackings, robberies, and several other offenses during his flee from the scene. Following his apprehension in the Dearborn area, defendant waived his *Miranda*[1] rights and was interviewed by Michigan State Police Detective Sergeants William Eberhardt and Thomas DeClercq. During the interview, defendant requested the assistance of counsel. Defendant repeated his request at least four times before the detectives terminated the interview entirely. Defendant was then taken to a holding cell, where he made an inculpatory statement to DeClercq. Defendant was subsequently taken back to the interview room and questioned.

Defendant was bound over for trial and subsequently moved for a hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), on the basis that inculpatory statements made by defendant to the detectives were obtained in violation of *Miranda*. Following a hearing, the trial court issued its ruling by reference to defendant's statements as occurring during three distinct chronological "episodes." It deemed defendant's statements during his initial interview with the detectives as episode one, defendant's statement

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694, reh den sub nom *California v Stewart*, 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

made to DeClercq while in a holding cell as episode two, and defendant's second interview as episode three. Relying on *Miranda*, *People v Paintman*, 412 Mich 518; 315 NW2d 418 (1982), and *People v Kowalski*, 230 Mich App 464; 584 NW2d 613 (1998), the trial court ordered the suppression of defendant's statements made following his initial request for an attorney during episode one, and defendant's statements made during episode three. The trial court ruled that defendant's statements before his request for an attorney in episode one, and his statement during episode two would be admissible at trial. The trial court reviewed the videotaped interviews at the prosecutor's request, and reaffirmed its rulings at a hearing the following day.

Plaintiff argues that the trial court erred when it partially granted defendant's motion to suppress his statements. On appeal from a ruling on a motion to suppress evidence of a confession, we review the record de novo but give deference to the trial court's findings and do not disturb those findings unless they are clearly erroneous. *Kowalski, supra* at 471-472. A finding is clearly erroneous if the finding leaves this Court with a definite and firm conviction that a mistake was made. *People v Hall*, 249 Mich App 262, 267-268; 643 NW2d 253 (2002). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

The United States and Michigan Constitutions guarantee a right against self-incrimination. US Const, Am V; Const 1963, art 1, sec 17. This right protects a defendant from being compelled to testify against himself or to provide evidence of a testimonial nature. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). A statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda, supra* at 444. Before a challenged confession may be admitted as evidence, the prosecutor must establish by a preponderance of the evidence that the defendant waived his *Miranda* rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000).

Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently given are separate prongs of a two-part test for a valid waiver of *Miranda* rights. *Daoud, supra* at 635-639. "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000).

Plaintiff argues that the trial court erred in ruling that there was any *Miranda* violation during the detectives' interview of defendant. The record demonstrates that defendant was read his *Miranda* rights and that defendant waived his right to an attorney at the beginning of the first interview. Defendant never contested the validity of his initial waiver of his *Miranda* rights.

We first address the trial court's suppression of that portion of episode one that occurred after defendant's first request for an attorney at 47 minutes and 25 seconds into the interview. We conclude that defendant's request, "can I get a lawyer 'cause I don't like this, man. You're trying to get my sister in trouble, my mom in trouble," to be unequivocal. Eberhardt testified that defendant's request followed questioning about the potential involvement or knowledge on the part of defendant's mother and sister, after which defendant became upset. Plaintiff argues that the detectives did not interrogate defendant after his initial request for an attorney; rather, they attempted to clarify whether defendant was requesting an attorney for himself, his mother,

or his sister. Both officers testified that they continued talking to defendant after his request for an attorney because they were confused about for whom defendant requested an attorney.

The police are not required to cease questioning or to clarify whether an accused wants counsel when an ambiguous statement regarding counsel is given. *Davis v US*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). The present case can be distinguished from *Davis* and *Adams*. The United States Supreme Court held that the defendant in *Davis supra* at 462, did not invoke his *Miranda* rights when he stated, "[m]aybe I should talk to a lawyer" during a custodial interrogation. While that statement is clearly capable of two different interpretations, defendant's statement is the present case, which began with "can *I* get a lawyer," is not. This Court held that the defendant's statement, ["[c]an I talk to him a lawyer right now?" was insufficient to invoke the defendant's *Miranda* rights in *Adams, supra* at 238. However, the Court reasoned that the defendant's statement was precipitated by his inquiries into the way the process worked if the defendant were to request an attorney, so his statement was not an actual demand for an attorney. *Id*. This type of inquiry did not occur in the present case. The record demonstrates that defendant requested an attorney because he did not like the direction of the interview. The trial court correctly ruled that the detectives should have considered this statement an unequivocal request for an attorney.

Once a defendant invokes his right to counsel, all interrogation must cease until the defendant is appointed an attorney, unless the defendant himself initiates further communication. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *Paintman, supra* at 525; *Kowalski, supra* at 478. *Miranda* requires that interrogation cease until new and adequate warnings are given, and there is a reasonable basis for the conclusion that the defendant has voluntarily changed his mind. *Kowalski, supra* at 473. However, *Edwards* does not prohibit all communication between the police and the defendant; rather, further police-initiated custodial interrogation is prohibited. *Id*. at 478. Under *Miranda*, interrogation refers to express questioning or its "functional equivalent." *Id*. at 479, citing *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). "The 'functional equivalent' of interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id*., quoting *Innis, supra*, 446 US at 301.

It does not appear from the record before us that defendant was expressly questioned following his first request for an attorney. However, we hold that the detectives' continuation of the interview was the "functional equivalent" of custodial interrogation, because their words and actions were "reasonably likely to elicit an incriminating response." We know of no legal principle requiring a police officer to clarify for whom an accused has requested counsel. Eberhardt testified that a second purpose for the continued communication with defendant was to put him on notice of the information the detectives felt they knew. Eberhardt admitted that he made these statements following defendant's fourth request for an attorney, and the record demonstrated that the statements continued following defendant's fifth request for an attorney.

We recognize that certain types of communication between the police and the defendant are permitted following a defendant's request for an attorney. *Kowalski, supra* at 478. These include an inquiry into whether a defendant has changed his mind about wanting to speak to an

attorney, *id*. at 479-483, and advising a defendant of the nature of the charge against him and the circumstances that led the police to believe that the defendant was the responsible party. *People v McCuaig*, 126 Mich App 754, 759-760; 338 NW2d 4 (1983). Here, however, the detectives should have known that these statements were reasonably likely to elicit an incriminating response from defendant. The detectives exceeded the scope of the permissible communication allowed under *Miranda*, as contemplated in *Edwards* and as interpreted by this Court in *Kowalski* and *McCuaig*. The continued statements, despite defendant's five requests for an attorney, were the "functional equivalent" of interrogation. The trial court did not err in ruling that the portion of the interview following defendant's first request for an attorney was inadmissible at trial.

The trial court also ruled that defendant's statements during episode three would be inadmissible at trial. The episode occurred in the interview room, following defendant's statement to DeClercq while they were in the holding cell, or "episode two." DeClercq's testimony indicates that episode two occurred after he placed defendant in a holding cell and told defendant that he would be transported to the Calhoun County Jail. Then, defendant initiated a conversation during which he made an inculpatory statement. DeClercq explained that he asked defendant "are you waiving your right to a lawyer, did you understand that you have asked for a lawyer, I can't talk to you, do you want to waive your right to a lawyer," to which defendant replied, "yes, I do." DeClercq stated that he then took defendant back to the interview room, where episode three occurred. Two troopers that were present during the conversation corroborated DeClercq's testimony. The detectives testified that they did not readvise defendant of his *Miranda* rights once they had returned to the interview room. The record demonstrates that at the start of episode three, defendant was asked whether he wanted to waive his right to an attorney, and defendant replied affirmatively.

The prosecutor argues, and we agree, that the trial court made inconsistent rulings regarding episodes two and three, despite the fact that episode three was a direct result of episode two. In ruling that defendant's statement during episode two was admissible, the trial court reasoned that it was spontaneous and was made voluntarily, without prompting or discussion about an attorney, and was made in its entirety before DeClercq responded to defendant's request to speak to him. The trial court also ruled that episode two was not tainted by the initial *Miranda* violation, because the record indicated that defendant was alert, that he was not intoxicated, that he had slept, and that his answers related to the questions asked. However, the trial court then ruled that defendant's statements made during episode three, once he was brought back into the interview room, were inadmissible.

Regarding episode three, the trial court first indicated that the taint in episode one did not preclude the admission of the statements in episode three. When asked why the taint would reapply upon a return to the interview room, the trial court contradicted itself and explained that the continued interrogation and defendant's five requests for an attorney formed the basis for that conclusion. However, the trial court ruled that during episode two, defendant voluntarily and spontaneously reinitiated contact with DeClercq, and that this statement was not tainted by the initial *Miranda* violation. Because episode three occurred as a direct result of episode two, we believe it reasonable to conclude that the *Miranda* violation in episode one did not preclude the admission of the statements made in episode three.

We hold that the trial court erred in concluding that defendant's statements made during episode three would be inadmissible at trial. In its initial ruling, the trial court appears to have based its decision on the fact that the detectives did not advise defendant of his *Miranda* rights again before the episode three interview occurred.

The trial court clarified that "the re-advising of *Miranda* would have in my view been more in conformance with appellate cases." The trial court explained that doing so would have helped it find the episode three statements admissible under the totality of the circumstances. When the hearing continued the next day, the trial court distinguished the present case from *Kowalski*, where the prosecutor re-Mirandized the defendant and asked him several questions before resuming the interview with the defendant. The trial court stated that the detectives' statements in the present case failed in comparison to the "thoroughness of that colloquy" by the prosecutor in *Kowalski*. The trial court indicated that while the detectives' failure to readvise defendant of his *Miranda* rights was "not the sine qua non" of its ruling, the ruling stood under the totality of the circumstances.

However, the trial court's ruling on episode two supports the opposite conclusion. Additionally, the police are not required to repeat the *Miranda* warnings before a second statement is obtained. The failure of the police to repeat the *Miranda* warnings before a second statement does not preclude a finding, based on the totality of circumstances, that defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights to silence and counsel. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603; 405 NW2d 114 (1986).

The trial court reasoned that for episode three, it could not find a valid waiver "because of the kind of shorthand peremptory inquiry relating back to something that was explained almost an hour ago and after the response, then goes on to the officer directly questioning. No sir, I cannot and will not find that." However, the corollary of this statement, which we find persuasive, is the argument that the amount of time that had passed since defendant initially waived his *Miranda* rights was short, that defendant must have understood those rights because he invoked his right to an attorney during the first interview, and that defendant's subsequent agreement to speak to the detectives after episode two was based on that understanding.

The record demonstrates that defendant was conscious of his rights when he agreed to speak further to the detectives after he reinitiated communication with DeClercq. Defendant was asked whether he was waiving his right to an attorney before he was taken from the holding cell. Further, upon being returned to the interview room, defendant was again asked whether he wished to waive his right to an attorney. Defendant responded affirmatively both times. There was no evidence that the detectives coerced defendant into participating in the second interview. The record supports a conclusion that defendant voluntarily waived his *Miranda* rights by initiating further communication with the detectives. We conclude that the trial court erred in ruling that defendant's statements made during episode three would be inadmissible at trial. Therefore, we hold that any statements made by defendant during what the trial court called episodes two and three are admissible at trial.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio